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NOT SO BLACK AND WHITE: THE THIRD CIRCUIT UPHOLDS
RACE-CONSCIOUS REDISTRICTING IN *DOE EX REL. DOE*
v. LOWER MERION SCHOOL DISTRICT

ALEXANDRA MUOLO*

“This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.”¹

I. INTRODUCTION

*Brown v. Board of Education*² was a landmark decision, symbolizing the end of legalized racial discrimination.³ The commitment of *Brown* was to provide equal educational opportunities for students of all races.⁴ After *Brown*’s declaration that state laws establishing separate public schools for black and white students were unconstitutional, the racial landscape within the United States drastically changed as schools across the country began the process of desegregation.⁵ Although desegregation gained mo-

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1. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring).

2. 347 U.S. 483 (1954).

3. *See generally id.* (holding segregated public schools unconstitutional under Equal Protection Clause of Fourteenth Amendment).

4. *See id.* at 493 (“[Education] is the very foundation of good citizenship. To-day it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”); *see also* Craig R. Heeren, Article, “*Together at the Table of Brotherhood: Voluntary Student Assignment Plans and the Supreme Court*,” 24 HARV. BLACKLETTER L.J. 133, 149 (2008) (stating Justices in *Brown* were concerned with providing educational opportunities for all and positively enforcing integration).

5. *See* Sean F. Reardon, Elena Grewal, Demetra Kalogrides & Erica Greenberg, *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL’Y ANALYSIS & MGMT. 876, 876 (2012) (noting advancement of desegregation after *Brown*). “In 1964, 99 percent of black students in the South attended all-black schools.” *Id.* By 1971, however, “only about 20 percent [of black students] attended such schools” *Id.*; *see also* Bryant Smith, *Far Enough or Back Where We Started: Race Perception from Brown to Meredith*, 37 J.L. & EDUC. 297, 298 (2008) (“Pivotal, phenomenal, tremendous, and fundamental: these are just a few terms used to illustrate the impact of *Brown*. *Brown* made a global impact on society psychologically and prospectively.”). The Supreme Court

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mentum during the civil rights movement, the push toward absolute equality within public schools ultimately subsided and racial segregation became the norm once again.⁶ African American students today are experiencing nearly the same racial isolation Linda Brown experienced almost sixty years ago.⁷ As the precedential line of Supreme Court decisions fostering desegregation move toward the distant past, it is apparent the objective of racial integration and educational equality might never be realized.⁸

Public schools remain one of the most racially segregated and unequal institutions of American life.⁹ Nationwide, eighty percent of Latino students and seventy-four percent of African American students attend schools where a majority of the students are nonwhite.¹⁰ Moreover, forty-three percent of Latino students and thirty-eight percent of African American students attend schools that are deeply segregated.¹¹

decision in *Brown* drastically changed societal norms by prohibiting segregated school systems. See *id.* at 299 (demonstrating drastic change in social norms following *Brown*). There was a huge shift in the public school system post-*Brown*, but the social issues surrounding segregated schools still exist. See *id.* at 300 (explaining that despite shift in school system, many schools remained segregated).

6. See Editorial, *Resegregation Now*, N.Y. TIMES (June 29, 2007), http://www.nytimes.com/2007/06/29/opinion/29fri1.html?_r=0 ("The nation is getting more diverse, but by many measures public schools are becoming more segregated.").

7. See *New National Study Finds Increasing School Segregation*, HARV. GRADUATE SCH. OF EDUC. (June 2011), http://www.gse.harvard.edu/news_events/features/1999/orfielddeseg06081999.html ("After greatly increasing desegregation of public schools a generation ago, the United States public education system is now steadily consolidating a trend toward racial resegregation that began in the late 1980s . . .").

8. See Erica Frankenberg & Chinh Q. Le, *The Post-Parents Involved Challenge: Confronting Extralegal Obstacles to Integration*, 69 OHIO ST. L.J. 1015, 1069 (2008) (observing current resegregation trends and commenting that our nation has fallen well short of goal of complete desegregation); see also Daniel S. Levine, *Schools Resegregate After Being Freed from Judicial Oversight, Stanford Study Shows*, STAN. NEWS (Dec. 5, 2012), <http://news.stanford.edu/news/2012/december/schools-resegregation-study-120412.html> (noting steady resegregation is causing nation to slowly move away from promises of *Brown*). Current resegregation trends are not in violation of the ruling in *Brown* because there is not state action of mandated racial segregation. See *id.* (commenting on legality of resegregation trends). Such trends do, however, move our nation further away from the ideal of black and white students attending school together. See *id.* (noting resegregation trends harm promises of *Brown*).

9. See Heeren, *supra* note 4, at 135 ("[D]espite significant success in dismantling segregation in most other realms, schools remain one of the most contentious and racially segregated aspects of American life.").

10. See Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, *E Pluribus . . . Separation: Deepening Double Segregation for More Students*, THE CIVIL RIGHTS PROJECT 19 (Sept. 2012), http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf (noting segregated racial composition of schools in spite of dramatic suburbanization of nonwhite families).

11. See *id.* (defining "intensely segregated" as those schools with only zero to ten percent of whites students).

Correspondingly, there is an increasing achievement gap between white and minority students.¹² Racially segregated schools are strongly linked with various factors that limit educational opportunities and outcomes for minority students.¹³ Conversely, mounting evidence has demonstrated a substantial correlation between desegregated schools and profound social benefits for students of all races.¹⁴ Such benefits include prejudice reduction, heightened civic engagement, more complex thinking, and better learning outcomes in general.¹⁵

12. See Eboni S. Nelson, *What Price Grutter? We May Have Won the Battle, but Are We Losing the War?*, 32 J.C. & U.L. 1, 8–9, 25–26 (2005) (discussing racial disparities in educational achievement); see also Steven Cann, *Politics in Brown and White: Resegregation in America*, 88 JUDICATURE 74, 74 (2004) (comparing “separate but equal” racial segregation policies prior to *Brown* and segregation issues in urban America today). Today, schools are still segregated by race. See *id.* (noting current segregation). “Every indicator from drop-out and graduation rates to test scores indicates that students of color in central city school districts are not receiving the same educational opportunities as their white counterparts in well-funded suburban schools.” *Id.* Although public schools are not explicitly segregated by race, the racial composition of urban schools and suburban schools is noteworthy. See *id.* at 77 (commenting on high segregation statistics). The difference in educational opportunities and preparedness for further education is a cause of concern. See *id.* (noting harmful effects of segregation).

13. See U.S. DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS (2011) [hereinafter U.S. DEP’T OF EDUC., VOLUNTARY USE OF RACE], <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html> (“The academic achievement of students at racially isolated schools often lags behind that of their peers at more diverse schools. Racially isolated schools often have fewer effective teachers, higher teacher turnover rates, less rigorous curricular resources (*e.g.*, college preparatory courses), and inferior facilities and other educational resources.”); see also Orfield et al., *supra* note 10, at 7–8 (“The consensus of nearly sixty years of social science research on the harms of school segregation is clear: separate remains extremely unequal. Schools of concentrated poverty and segregated minority schools are strongly related to an array of factors that limit educational opportunities and outcomes.”).

14. See Brief for 553 Social Scientists as Amici Curiae in Support of Respondents at 7–8, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2006) (Nos. 05-908 & 05-915), 2006 WL 2927079, at *7–8 (arguing racially integrated schools improve “life opportunities”); Brief for National Education Association et al. as Amicus Curiae in Support of Respondents at 25–30, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2006) (Nos. 05-908 & 05-915), 2006 WL 2927085, at *25–30 (detailing educational benefits of integrated schools); Orfield et al., *supra* note 10, at 9–10 (noting benefits of racially integrated schools); Reardon et al., *supra* note 5, at 36–37 (noting improvement in academic achievement). While the effect of early desegregation policies on academic achievement is not entirely clear, many argue the narrowing achievement gap between black and white students was due to school policies like desegregation. See *id.* at 37 (offering argument that desegregation helps narrow achievement gap).

15. See Orfield et al., *supra* note 10, at 9–10.

[Integrated schools] foster critical thinking skills that are increasingly important in our multiracial society—skills that help students understand a variety of different perspectives. Relatedly, integrated schools are linked to reduction in students’ willingness to accept stereotypes. Students attending integrated schools also report a heightened ability to communi-

Because the prevalence of racial segregation remains, the rationale of holding segregation policies unconstitutional still applies today.¹⁶ Separate is still not equal and racial segregation within our public school system is perpetuating educational inequality.¹⁷ Moreover, the negative consequences of racial segregation and the resulting widening achievement gaps impact society at large.¹⁸ Despite mounting evidence supporting racially integrated schools, the Supreme Court continues to strike down policies aimed at combating racial isolation.¹⁹ Recently, the Supreme Court issued a plurality decision in *Parents Involved in Community Schools v. Seattle School District No. 1*,²⁰ holding the race-based student assignment plans at issue unconstitutional.²¹ Current desegregation jurisprudence and resegregation trends threaten the commitment of *Brown* by making educational equality an unrealistic aspiration.²²

cate and make friends across racial lines. Studies have shown that desegregated settings are associated with heightened academic achievement for minority students (with no corresponding detrimental impact for white students). These trends later translate into loftier educational and career expectations, and high levels of civic and communal responsibility. Black students who attended desegregated schools are substantially more likely to graduate from high school and college, in part because they are more connected to challenging curriculum and social networks that supported such goals.

Id.

16. See Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 326 (2009) ("Today, even without the imprimatur of a law or official policy that explicitly seeks to divide students along racial lines and provide minority students substandard educational opportunities, racially isolated schools remain inferior to other schools.").

17. See Orfield et al., *supra* note 10, at xiii ("Separate is still unequal and many of the most critical dimensions of educational inequality are directly linked to segregation of our schools.").

18. See generally Gary Orfield, Daniel Losen, Johanna Wald & Christopher B. Swanson, *Losing Our Future: How Minority Youth Are Being Left Behind by the Graduation Rate Crisis*, THE CIVIL RIGHTS PROJECT AT HARV. UNIV. (2004), http://www.urban.org/UploadedPDF/410936_LosingOurFuture.pdf (analyzing high dropout rates among African American students and its effect on national economy). Linking racial isolation to higher dropout rates, the study argued racial integration would ultimately lead to a better economy. See *id.* at 7. "In an increasingly competitive, global economy the consequences of dropping out of high school are devastating to individuals, communities and our national economy." *Id.* at 2.

19. For a discussion of desegregation jurisprudence, see *infra* notes 35–48 and accompanying text.

20. 551 U.S. 701 (2007).

21. See generally *id.*; see also Robinson, *supra* note 16, at 285 (noting *Parents Involved* virtually closed door on use of race of individual students to make student assignments to schools).

22. See Eboni S. Nelson, *Parents Involved & Meredith: A Prediction Regarding the (Un)constitutionality of Race-Conscious Student Assignment Plans*, 84 DENV. U. L. REV. 293, 297 (2006) ("Current resegregation trends threaten thirty years of progress that have been made in the desegregation of African-American students, thereby impeding the fulfillment of *Brown's* promise of educational equality."); see also Orfield et al., *supra* note 10, at 1 ("Sadly, we are steadily undoing the great

In the immediate aftermath of *Parents Involved*, many civil rights advocates feared the possibility of racially integrated schools was no longer viable.²³ In the concurring and controlling opinion, however, Justice Kennedy challenged school districts and their lawyers to innovate redistricting policies that would permissibly achieve the compelling interest of racial integration.²⁴ While the Supreme Court never fully defined what a valid redistricting policy would look like, school districts have attempted to develop creative race-conscious redistricting plans that fit within the constitutional framework of Equal Protection and desegregation jurisprudence.²⁵ Implementing a redistricting policy that racially integrated two district high schools, *Doe ex rel. Doe v. Lower Merion School District*²⁶ forced the Third Circuit to weigh in on this unsettled and controversial area of law.²⁷

This Casebrief argues the Third Circuit's recent treatment of the Equal Protection Clause with respect to race-conscious redistricting is not only consistent with current desegregation jurisprudence, but, by applying rational basis review, has created flexibility in allowing school districts and practitioners to further *Brown's* promise of equal educational opportunities for students of all races. Part II provides a brief history of racial segregation within the United States and examines the line of Supreme Court

triumph of the *Brown* decision and the subsequent civil rights revolution that spurred very significant desegregation of black students in the South. We are on the road away from *Brown* and accepting the return of school segregation . . .").

23. See Frankenberg & Le, *supra* note 8, at 1018 (discussing aftermath of *Parents Involved*). "[T]he dissents accused the plurality not only of hijacking *Brown* and its legacy, but also of threatening what little racial progress had been made." *Id.*; see also James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 133 (2007) (arguing *Parents Involved* took away any hope of integrated society).

24. See Frankenberg & Le, *supra* note 8, at 1018–19 ("With the dust now settled, however, some believe the immediate impact of the decision may not necessarily be as grave as originally feared, assuming, of course, that Justice Kennedy meant it when he said that some carefully crafted uses of race are permissible. For the creative and willing, opportunities to advance integration remain on the table."). "The law emerging from *Parents Involved* need not foreclose educational equity and integration; with the right mindset and approach, it can spurn greater innovation and effort. The Court having spoken without one clear voice, it is up to the people to determine the ultimate lesson and legacy of *Brown*." *Id.* at 1072.

25. See Rebecca M. Abel, Note, *Drawing the Lines: Pushing Past Arlington Heights and Parents Involved in School Attendance Zone Cases*, 2012 BYU EDUC. & L.J. 369, 370 (2012) ("Across the country, many students, parents, and community members recognize the benefits of diversity and would like their public schools to embody these values. Responding to community needs, urban, suburban, and rural school districts seek to implement voluntary plans that will diversify the student bodies of their schools. However, these districts fear potential legal consequences that can result from such plans. This fear has risen since the U.S. Supreme Court decision in *Parents Involved* Despite this transformative decision, many school districts remain committed to finding constitutional methods to integrate their public schools.").

26. 665 F.3d 524 (3d Cir. 2011).

27. See generally *id.*

decisions triggering resegregation in recent years.²⁸ Part III details the Third Circuit's decision in *Doe*.²⁹ Part IV discusses the importance of a racially integrated society and translates the Third Circuit's analysis in *Doe* into practical strategies for practitioners attempting to facilitate racially integrated school districts.³⁰ Finally, Part V concludes by addressing the overall impact of the Third Circuit's approach to racial integration.³¹

II. THE LEGAL DEVELOPMENT OF DESEGREGATION POLICIES

From the height of desegregation until now, the legal landscape regarding racial integration policies has drastically shifted.³² In the past thirty years, the Supreme Court has not issued a favorable opinion regarding school desegregation efforts.³³ Against this backdrop, resegregation trends are a growing concern, as meaningful racial integration policies are not likely to pass constitutional muster.³⁴ Such results encumber the commitment of *Brown*.³⁵ This Part examines desegregation jurisprudence, particularly focusing on the recent Supreme Court decision in *Parents Involved*.³⁶

A. The Historical Development of Resegregation

While the Supreme Court recognized the inherent inequalities of segregation and the importance of equal opportunities to quality education in *Brown*, our public school system is even more segregated today than

28. For a discussion of the history of racial segregation within the United States and an examination of the Supreme Court decisions pertaining to resegregation in recent years, see *infra* notes 32–67 and accompanying text.

29. For a discussion of the Third Circuit's decision in *Doe*, see *infra* notes 68–136 and accompanying text.

30. For a discussion of the importance of racial integration, see *infra* notes 143–48 and accompanying text. For a discussion of how the Third Circuit's treatment of race-neutral redistricting policies will allow school districts to try and bridge the achievement gap between races, see *infra* notes 149–64 and accompanying text.

31. For concluding remarks, see *infra* notes 165–68 and accompanying text.

32. See Ryan, *supra* note 23, at 157 (“After decades of requiring racially explicit steps toward school integration and castigating school officials who did not listen, the Court now largely forbids those steps and would castigate those school officials who listened all too well.”).

33. See *id.* at 142 (“[T]he reality is that the Court has not issued a significant, favorable opinion regarding school desegregation in about thirty years.”).

34. See *id.* (“From this perspective, the current decision is a fitting capstone to the Court's desegregation jurisprudence, which has generally—though not always intentionally—made meaningful integration fairly difficult to achieve.”).

35. See *id.* at 156 (commenting that *Parents Involved* is dangerous decision because it will make school integration “even harder, if not impossible”).

36. For a discussion of desegregation jurisprudence, see *infra* notes 37–50 and accompanying text. For a discussion of *Parents Involved*, see *infra* notes 51–67 and accompanying text.

when *Brown* was decided nearly sixty years ago.³⁷ Many factors have contributed to resegregation trends, most notably the series of Supreme Court decisions hindering desegregation efforts.³⁸ While the Supreme Court has issued decisions fostering the notion of equal educational opportunities for minority students, it has also issued decisions impeding policies designed to promote racial integration.³⁹

Throughout the civil rights movement, the federal executive branch and a unanimous Supreme Court fought aggressively for school desegregation.⁴⁰ During this period of pressure, massive policy changes occurred, altering the racial composition of public schools.⁴¹ As desegregation policies were put in place and enforced, the achievement gap between white

37. See Nelson, *supra* note 22, at 296–97 (“Many agree that public elementary and secondary schools are more segregated today than they were prior to the *Brown v. Board of Education* decision.”).

38. See Charles E. Dickinson, Note, *Accepting Justice Kennedy’s Challenge: Reviving Race-Conscious School Assignments in the Wake of Parents Involved*, 93 MINN. L. REV. 1410, 1419 (2009) (“While American cities remain extremely segregated, the Supreme Court has backtracked from its pro-integration decisions and presidential policies have turned away from desegregation efforts. The result was a return to the segregated schooling that left minority schoolchildren with the ‘devastating’ effects of an unequal education.”); see also Ryan, *supra* note 23, at 132 (noting why racial integration has faded from view).

39. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28–29 (1971) (validating use of busing for school desegregation); *Green v. Cnty. Sch. Bd. of New Kent Cnty., Va.*, 391 U.S. 430, 437–38 (1968) (placing “affirmative duty” on school boards operating segregated systems “to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch”); *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (instructing district courts to enter desegregation decrees that mandate admission of African American students into public schools “with all deliberate speed”). But see *Missouri v. Jenkins*, 515 U.S. 70, 103 (1995) (overturning district court ruling that required state of Missouri to correct *de facto* racial inequality in schools by funding salary increases and remedial education programs); *Freeman v. Pitts*, 503 U.S. 467, 485 (1992) (holding district court must only maintain control over school system in categories in which it has failed to abide by its court-ordered desegregation plan); *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237, 259 (1991) (ruling on duty of federal court in supervising school district remedying past discrimination); *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (prohibiting imposition of multi-district desegregation policies to remedy single-district intentional discrimination); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (upholding local property taxation as constitutionally permissible method for school financing despite resulting disparities in per-student expenditures).

40. See Orfield et al., *supra* note 10, at 3–4 (“In reality, the only period of consistent support for integrated schools from the executive branch and the courts was in the 1960s, following the hard-won passage of the 1964 Civil Rights Act. Between 1965 and 1969 the federal executive branch and a unanimous Supreme Court pressed aggressively for school desegregation.”).

41. See *id.* (noting that pressure from executive and Supreme Court resulted in massive changes, particularly in South where most blacks lived and policies vigorously enforced).

and black students began to narrow.⁴² Educational equality was slowly being realized across the nation.⁴³

Such progress came to a halt, however, with the election of President Richard Nixon.⁴⁴ After President Nixon appointed four conservative Justices to the Supreme Court, the Court's divided desegregation decisions ended the push toward educational equality through racial integration.⁴⁵ By 1974, the Supreme Court handed down two decisions that held as unconstitutional school desegregation policies aimed at equalizing educational opportunities for students of all races.⁴⁶ Continuing the derailment of desegregation policies into the 1990s, the Supreme Court decided three cases that further impeded any attempt at racial integration within the public school system.⁴⁷ Together these Supreme Court decisions permitted school systems to abandon desegregation plans and cut off funds meant to remedy the educational inequalities resulting from a long history of racial segregation.⁴⁸ Recently, the Supreme Court invalidated voluntary student assignment policies meant to further desegregation.⁴⁹ Such

42. See PAUL BARTON & RICHARD COLEY, EDUC. TEACHING SERV., *THE BLACK-WHITE ACHIEVEMENT GAP: WHEN PROGRESS STOPPED* 6 (2010), <http://www.ets.org/Media/Research/pdf/PICBWGAP.pdf> (noting large narrowing of achievement gap from early 1970s until late 1980s). While the narrowing of the achievement gap could be attributed to many factors, there may be a correlation to desegregation policies. See *id.* at 34 (examining possible reasons for narrowing achievement gap, including smaller class sizes and narrowing gaps in family resources).

43. See Ryan, *supra* note 23, at 140 (noting problem with initial commitment to desegregation: "[I]t came late, and it was short-lived").

44. See Orfield et al., *supra* note 10, at 3–4 ("The 1968 presidential election, however, ended such cooperation as President Nixon shut down administrative enforcement of desegregation requirements, shifted the position of the Justice Department from proactive enforcement to passive acceptance, appointed four conservative Justices to the Supreme Court and attacked desegregation rulings.").

45. See *id.* (noting change in Supreme Court resulted in 5–4 desegregation decision, which was first non-unanimous decisions regarding desegregation since *Brown*).

46. See *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (holding illegally segregated central city students had no right to gain access to better schools in suburbs); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding that local property taxation was constitutionally permissible method for school financing despite disparities in per-student funding).

47. See *Missouri v. Jenkins*, 515 U.S. 79, 103 (1995) (holding remedies need only bring victims of past discrimination to point where they would have been if discrimination had not occurred); *Freeman v. Pitts*, 503 U.S. 467, 485 (1992) (holding districts could be released from desegregation orders piecemeal and end segregation with incremental approach); *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237, 259 (1991) (holding court ordered desegregation was intended to be temporary and return to local control was preferable when district made good faith effort to desegregate).

48. See Reardon et al., *supra* note 5, at 35 ("Following the release from court order, white/black desegregation levels begin to rise within a few years of release and continue to grow steadily for at least 10 years.").

49. See *generally* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding assignment policy violated Equal Protection Clause of Fourteenth Amendment).

shifting desegregation jurisprudence has contributed to recent resegregation trends.⁵⁰

B. *The Seminal Redistricting Case: Parents Involved in Community Schools v. Seattle Public School District No. 1*

Acknowledging the potential harms of resegregation trends while being mindful of Supreme Court precedent limiting desegregation efforts, many school districts voluntarily implemented school assignment plans based on the racial composition of their students.⁵¹ In *Parents Involved*, for example, the Seattle school district and Jefferson County school district implemented new student assignment policies that relied on race in determining which school students would attend.⁵² The policies were designed to create classrooms that reflected the racial makeup of the community as a whole.⁵³ Students affected by the assignment policy brought suit, alleging a violation of the Equal Protection Clause of the Fourteenth Amendment.⁵⁴

The deeply divided Supreme Court ultimately concluded the assignment plans were unconstitutional, placing more limiting restrictions on desegregation efforts.⁵⁵ While four members of the Court opposed all uses of race in public school assignment policies, four members approved the policies as satisfying the requirements of Equal Protection jurisprudence.⁵⁶ Chief Justice Roberts's plurality opinion found the assignment policy impermissibly classified individuals on the basis of race, thus provid-

50. See Ryan, *supra* note 23, at 149 ("It may be plausible to conclude from current trends that most districts have forever turned their backs on racial integration, either out of choice or necessity, and therefore that the long-term impact of this decision will be just as minimal as the short-term impact.").

51. See Heeren, *supra* note 4, at 141 (noting many academics believed carefully crafted race-based K-12 assignment plans could survive judicial review by Supreme Court). Especially in the years immediately following the Supreme Court's rulings on affirmative action in higher education, race-based assignment plans in public schools became appealing. See *id.*

52. See *Parents Involved*, 551 U.S. at 711-18 (describing student assignment plan in both school districts). While the Seattle school district classified the students as white or nonwhite, the Jefferson County school district classified the students as black or "other" during the assignment process. See *id.* at 709-10.

53. See *id.* at 710 (noting reasons for new race-based student assignment plans).

54. See *id.* at 714-18 (detailing procedural history).

55. See *id.* at 747-48 (holding desegregation efforts through race-based student assignment policies in school districts at issue were unconstitutional).

56. See *id.* at 708-48 (discussing analysis of plurality); see *id.* at 803-68 (Breyer, J., dissenting); see also Michael A. Helfand, *How the Diversity Rationale Lays the Groundwork for New Discrimination: Examining the Trajectory of Equal Protection Doctrine*, 17 WM. & MARY BILL RTS. J. 607, 610 (2009) ("[T]he [plurality] advanced colorblindness, at the expense of the potential remedial effects of diversity, while the dissent championed educational equality at the expense of colorblind policies. In between these two extremes stands Justice Kennedy's concurrence—or so the common thinking goes—which articulated some sort of middle ground that incorporated elements of these two hard-line positions.").

ing burdens and benefits accordingly.⁵⁷ In reaching its decision, the plurality opinion held that racial classifications were not narrowly tailored to achieve a compelling government interest.⁵⁸ Conversely, Justice Breyer wrote a derisive dissent criticizing the plurality decision.⁵⁹ Noting the difference between policies that “include” compared to policies that “exclude” due to racial classifications in the law, the dissent advocated for a less stringent standard of review.⁶⁰

Justice Kennedy straddled the plurality and dissent by holding the policies unconstitutional, yet offered insight into how school districts and practitioners can develop race-conscious redistricting plans that avoid constitutional challenge.⁶¹ Thus, a majority of the Justices concluded school districts have flexibility in avoiding racial isolation.⁶² Qualifying the concurrence, Justice Kennedy affirmed race-conscious assignment policies by

57. See *Parents Involved*, 551 U.S. at 720 (applying strict scrutiny because assignment plans involved state distribution of burdens or benefits on basis of individual race classifications). The assignment plans specifically targeted students on the basis of their race and assigned students to various schools to achieve diversity within the school district. See *id.*; Ryan, *supra* note 23, at 151 (“The Chief Justice argues strenuously that colorblindness is most consistent with *Brown* and requires severely restricting, if not prohibiting, racial considerations regardless of the overall goal—whether to include or exclude, segregate or integrate.”).

58. See *Parents Involved*, 551 U.S. at 723–24 (determining diversity is not compelling interest in elementary schools).

59. See *id.* at 804–67 (Breyer, J., dissenting) (detailing why plurality is wrong in its decision to invalidate race-based assignment plans). “The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*.” *Id.* at 868.

60. See *id.* at 823–38 (arguing for rational basis standard of review). Although the dissent argued for rational basis review, it ultimately applied strict scrutiny and concluded that the plan passed even the higher standard of review. See *id.* at 837 (concluding that prior decisions bound Court into strict scrutiny but plan served compelling state interest and was narrowly tailored); see also Heeren, *supra* note 4, at 152 (discussing “anti-subordination” type of reasoning utilized by dissent). “Anti-subordination” stands for the proposition that “racial identity may be legitimate, meaningful and have social utility.” *Id.* “[T]he use of race in student assignment for the purpose of integration or increasing racial diversity is a compelling interest because it produces greater achievement and educational opportunity.” *Id.* at 152–53.

61. See Heeren, *supra* note 4, at 141 (“As the controlling vote, Justice Kennedy precariously straddled the two sides by agreeing that the use of race in these plans is unconstitutional because they are not narrowly tailored, but also suggested that future race-based plans still could be successful if appropriately designed.”).

62. See *id.* at 143 (“Justice Kennedy’s concurrence is the most important because it lays out a basic framework for assignment plans that might be constitutionally adequate to a majority of justices.”); see also Ryan, *supra* note 23, at 133 (“It is not entirely clear whether the tools left to them will be sufficient to the task, but Justice Kennedy, whose lone opinion is effectively controlling on this issue, does leave the door ajar for districts interested in racial integration.”). Justice Kennedy’s opinion is controlling because the four dissenting justices would seemingly allow any redistricting plan that satisfied Justice Kennedy’s standards. See *id.* at 137 (“There are thus five votes for upholding some uses of race to achieve integration, but the only vote that really counts is Justice Kennedy’s.”).

noting, “it is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body.”⁶³ Recognizing the growing concerns of racial isolation within the public school system, Justice Kennedy continued:

If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.⁶⁴

Such race-conscious measures include drawing attendance zones with general recognition of the demographics of neighborhoods.⁶⁵ Because these mechanisms are race-conscious but do not classify students exclusively by race, Justice Kennedy stated it would be unlikely the policies would demand strict scrutiny and such race-conscious measures would be permissible.⁶⁶ Thus, the plurality opinion held Seattle and Jefferson County assignment policies unconstitutional, but left open the opportunity to develop refined policies that aligned with current Equal Protection and desegregation jurisprudence.⁶⁷

III. SHADES OF GREY: THE THIRD CIRCUIT APPROACH TO DESEGREGATION

In the wake of *Parents Involved* and the uncertainty surrounding the constitutionality of racial integration, the Third Circuit was the first federal court of appeals to respond to existing desegregation jurisprudence.⁶⁸

63. *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring); see also Heeren, *supra* note 4, at 143 (“Although he agreed that the case did not fit any existing compelling interest framework, Justice Kennedy argued, like Justice Breyer, that there was a compelling interest in avoiding racial isolation and achieving diversity in schools.”).

64. *Parents Involved*, 551 U.S. at 788–89 (Kennedy, J., concurring). Justice Kennedy argued that the country “has a moral and ethical obligation” to avoid racial isolation. See *id.* at 798–99 (“A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.”).

65. See *id.* at 789 (noting means school districts can use to achieve goal of racial integration without violating Equal Protection Clause).

66. See *id.* (“These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”).

67. See U.S. DEP’T OF EDUC., VOLUNTARY USE OF RACE, *supra* note 13 (“Thus, although there was no single majority opinion on this point, *Parents Involved* demonstrates that a majority of the Supreme Court would be ‘unlikely’ to apply strict scrutiny to generalized considerations of race that do not take account of the race of individual students.”).

68. See *Lawyers’ Committee, NAACP LDF, and ACLU File Amicus Brief in Doe v. Lower Merion*, LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW (Jan. 12, 2011), <http://www.lawyerscommittee.org/projects/education/clips?id=0218> [hereinafter

This Part of the Casebrief provides background on the Lower Merion School District's race-conscious redistricting policy and discusses the Third Circuit's analysis.⁶⁹

A. Background Facts and Procedure

Recognized as one of the finest school systems in the United States, Lower Merion School District serves approximately 62,000 residents of the Philadelphia Main Line suburbs.⁷⁰ The School District operates six elementary schools, two middle schools, and two high schools.⁷¹ Because the two high schools, Harriton and Lower Merion High School, were outdated and in need of significant investment, the Lower Merion Board of School Directors (Board of Directors) adopted a proposal to build two new high schools of equal enrollment capacity.⁷² At the time the proposal was approved, approximately 1,600 students attended Lower Merion High School and 900 students attended Harriton High School.⁷³ With such imbalanced numbers, achieving equal enrollment in each new high school required redistricting.⁷⁴

Prior to developing redistricting policies, the Board of Directors established a list of five "Non-Negotiables," which served as a guide for the

Lawyers' Committee] (reporting on legal significance of *Doe*); Robinson, *supra* note 16, at 362 (commenting that "the Supreme Court's decision in *Parents Involved* brings the nation to a crossroads in its history: will it continue to pursue integrated educational settings and equal educational opportunity, or will it allow the current racial resegregation of public schools to continue unabated?"). "This is the first case to reach a federal court of appeals that requires an interpretation of the Supreme Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*." *Lawyers' Committee, supra*.

69. For a background discussion of *Doe*, see *infra* notes 70–94 and accompanying text. For a summary of how the Third Circuit reached its holding in *Doe*, see *infra* notes 95–136 and accompanying text.

70. See *About LMSD*, LOWER MERION SCHOOL DISTRICT, <http://www.lmsd.org/sections/about> (last visited Feb. 10, 2013) (providing information about Lower Merion School District).

71. See *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 530 (3d Cir. 2011) (discussing development of redistricting plan). Lower Merion School District operates six elementary schools (Belmont Hills, Cynwyd, Gladwyne, Merion, Penn Valley, and Penn Wynne); two middle schools (Bala Cynwyd and Welsh Valley); and two high schools (Harriton and Lower Merion High School). See *id.*

72. See *id.* (choosing final proposal because students would benefit from stronger sense of community, better student-faculty interactions, and better educational outcomes). The committee considered the following plans: (1) creating a separate school for grade nine only and another school for grades ten through twelve; (2) building one new high school that all high school students would attend; (3) building two new high schools to replace Harriton and LMHS with the same student populations as Harriton and LMHS; and (4) building two new high schools with 1,250 students enrolled at each school. See *id.*

73. See *id.* (discussing enrollment of each high school).

74. See *id.* (noting under current districting lines Lower Merion High School enrolled 700 more students than Harriton).

redistricting process.⁷⁵ Explicitly defining the primary objectives of redistricting, the Non-Negotiables included the following requirements: (1) high school enrollment will be equalized; (2) elementary schools will be at or under capacity; (3) the plan will not increase the number of required buses; (4) the class of 2010 will have the choice to follow the plan or attend their original high school; and (5) redistricting will be based on current and expected needs.⁷⁶ Additionally, the Board of Directors compiled a list of values embraced by the Lower Merion community, which served as further guidance throughout the redistricting process.⁷⁷ One such value was to “[e]xplore and cultivate whatever diversity—ethnic, social, economic, religious and racial—there is in Lower Merion.”⁷⁸

In developing various redistricting plans, the Board of Directors hired an outside consultant to review and analyze district enrollment data.⁷⁹ Such data included racial composition, socioeconomic status, and disability.⁸⁰ Upon assessing the enrollment data, the consultant prepared eight different redistricting scenarios to present to the Board of Directors.⁸¹ Guided by the Non-Negotiables, the eighth scenario was further developed into Plan 3R; the Board of Directors voted to implement the redistricting plan on January 12, 2009.⁸²

75. *See id.* at 532 (discussing Board of Directors’ establishment of guidelines for redistricting process).

76. *See id.* (describing objectives of redistricting).

77. *See id.* (explaining that Board of Directors hired two consultants to issue report listing five community values with help of public forums and online surveys). The list included the following:

1. Social networks are at the heart of where people live, and those networks expand as people grow older;
2. Lower Merion public schools are known for their excellence: academic as well as extracurricular;
3. Those who walk should continue to walk while the travel time for non-walkers should be minimized;
4. Children learn best in environments when they are comfortable—socially as well as physically; and
5. [E]xplore and cultivate whatever diversity—ethnic, social, economic, religious and racial—there is in Lower Merion.

Id.

78. *Id.*

79. *See id.* (stating that Board of Directors hired Dr. Ross Haber to create redistricting plans called scenarios).

80. *See id.* at 533 (explaining that data for each factor was not reported for every scenario).

81. *See id.* at 532–33 (outlining each scenario).

82. *See id.* at 537 (explaining Plan 3R and detailing why Board members voted as they did). Six Board members voted in favor of the plan, two voted against the plan, and then-Board President Lisa Pliskin supported the plan, but could not vote because she was hospitalized. *See id.* (explaining that all Board members supported plan because of educational benefits, not race). Diane DiBonaventuro voted against Plan 3R, stating the plan created an “additional stressor” for African American students by “asking Ardmore kids to take one for the team.” *See id.* David Ebby voted against Plan 3R for reasons excluding race. *See id.* at 538.

Prior to redistricting, the racial composition of Harriton and Lower Merion High School was unequal.⁸³ The percentage of African American students at Lower Merion High School was double the percentage at Harriton.⁸⁴ Throughout the redistricting process, the Board of Directors and developers of Plan 3R intentionally considered the racial composition of the school district.⁸⁵ While the redistricting was based on the students' place of residence, Plan 3R focused on Ardmore as the affected redistricting area, which contained the highest concentration of African American students.⁸⁶ Students living in South Ardmore were redistricted for Harriton, while students living in North Ardmore remained districted for Lower Merion High School.⁸⁷ Because Ardmore had the highest concentration of African Americans of all the neighborhoods in Lower Merion School District, equalized diversity between the two high schools was the decisive result.⁸⁸

On May 14, 2009, Students Doe 1 through 9 filed a complaint.⁸⁹ Prior to the implementation of Plan 3R, Students Doe were districted for Lower Merion High School.⁹⁰ Under Plan 3R, however, they were required to attend Harriton.⁹¹ Consequently, Students Doe claimed Lower Merion School District violated the Equal Protection Clause by adopting Plan 3R because Plan 3R discriminated against them on the basis of

83. *See id.* at 531 (noting 5.7% of Harriton's total student population was African American, yet 10% of Lower Merion's total student population was African American). During this time, both North and South Ardmore were districted for Lower Merion High School. *See id.*

84. *See id.* (discussing racial composition of both high schools).

85. *See id.* at 533 (noting racial composition of high school was included in presentation of scenarios and discussed by Board of Directors and developers of Plan 3R throughout redistricting process).

86. *See* Student Doe 1 v. Lower Merion Sch. Dist., Civil Action No. 09-2095, 2010 WL 1956585, at *6 (E.D. Pa. May 13, 2010) (discussing racial composition of district). In September 2008, South Ardmore had 308 students in Lower Merion schools, of which 140 were white, 140 were African American, 9 were Asian American, and 18 were Hispanic American. *See id.* at *6 n.2. North Ardmore had 167 school age children, of which 32 were white, 107 were African American, 12 were Asian American, and 16 were Hispanic American. *See id.*

87. *See Doe*, 665 F.3d at 535 (detailing Plan 3R). Prior to the redistricting of Lower Merion School District, all students living in Ardmore, North and South, could choose to attend either Harriton or Lower Merion High School. *See id.* at 531 (explaining options before redistricting).

88. *See id.* at 531, 536 (noting heavier African American population affected by redistricting). The proposed plan was projected to increase the African American student population at Harriton from 5.7% to 9.6%. *See id.* at 536 (providing redistricting projections).

89. *See id.* at 538 (discussing procedural history).

90. *See id.* at 531 (explaining districting of both high schools before Plan 3R).

91. *See id.* at 538 ("For the 2009–2010 academic year, Student Doe 4 chose to attend Harriton and all other Students Doe attended Penn Valley Elementary School or Welsh Valley Middle School.").

race.⁹² The district court applied strict scrutiny and determined Plan 3R was constitutional because it was narrowly tailored to achieve a compelling state interest.⁹³ Dissatisfied with the ruling, Students Doe appealed to the Third Circuit.⁹⁴

B. *Third Circuit Analysis*

Students Doe alleged Plan 3R violated the Equal Protection Clause because the redistricting improperly used racial criteria in mandating attendance at Harriton.⁹⁵ According to the Equal Protection Clause, “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁹⁶ The central purpose of the Clause is to prohibit states from intentionally discriminating against individuals on the basis of race.⁹⁷ When intentional discrimination on the basis of race is demonstrated, the policy must pass review under the strictest of scrutiny.⁹⁸ Policies that are merely race-conscious, however, do not necessarily imply intentional discrimination and might only demand rational basis review.⁹⁹ In determining whether Plan 3R violated the Equal Protection Clause, therefore, the Third Circuit was required to identify the appropriate level of scrutiny.¹⁰⁰

1. *Intentional Discrimination Shown by Racial Classification*

The Supreme Court has established that classifications in the law explicitly based on race are “presumptively invalid and can be upheld only upon an extraordinary justification.”¹⁰¹ Thus, when policies distribute

92. *See id.* (alleging Lower Merion School District violated Equal Protection Clause of Fourteenth Amendment).

93. *See* Student Doe 1 v. Lower Merion Sch. Dist., Civil Action No. 09-2095, 2010 WL 2595278, at *3 (E.D. Pa. June 24, 2010) (holding redistricting plan for Lower Merion School District constitutional after applying strict scrutiny).

94. *See Doe*, 665 F.3d at 541 (noting Students Doe filed timely appeal).

95. *See id.* at 538–39 (stating violations alleged by plaintiffs).

96. U.S. CONST. amend. XIV, § 1.

97. *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (determining Equal Protection racial discrimination claims could only be upheld if intentional discrimination could be proven).

98. *See id.* at 242 (stating applicable level of scrutiny); *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding state has burden of proving that policy is narrowly tailored and furthers compelling interest under strict scrutiny analysis).

99. *See* Crawford v. Bd. of Educ., 458 U.S. 527, 538 (1982) (“[A] distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters [T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.”). Such distinction suggests that race-conscious policies might pass constitutional muster because only rational basis review is applied. *See id.*

100. *See Doe*, 665 F.3d at 543–44 (discussing Equal Protection jurisprudence and when certain levels of scrutiny are applicable).

101. Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 272 (1979).

burdens or benefits to individuals on the basis of racial classifications, strict scrutiny is the appropriate standard of review.¹⁰² The Third Circuit has defined racial classifications as “governmental standard[s], preferentially favorable to one race or another, for the distribution of benefits.”¹⁰³ Under the Third Circuit’s definition, a racial classification is formed, and is consequently discriminatory, when a policy explicitly distinguishes between individuals on the basis of race.¹⁰⁴

The Third Circuit determined Plan 3R did not fall into this category of Equal Protection violations.¹⁰⁵ Because Plan 3R was based on the geographic location of students and did not redistrict Students Doe solely based on race, the policy was deemed race-neutral.¹⁰⁶ The Third Circuit was able to distinguish Plan 3R from *Parents Involved* because race was not the primary factor in redistricting.¹⁰⁷ Unlike the race-based student assignment policy in *Parents Involved* that relied exclusively on race, Plan 3R focused on the five Non-Negotiables throughout the redistricting process and only discussed race as an ancillary issue.¹⁰⁸ Relying on Supreme Court precedent, the Third Circuit further reasoned that “race consciousness does not lead inevitably to impermissible race discrimination.”¹⁰⁹ Despite evidence demonstrating Lower Merion School District was aware of the racial composition of Ardmore when redistricting, such awareness did not equate to a racial classification.¹¹⁰ As such, the Third Circuit held

102. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (noting benefit or burdens against racial classification is necessary for strict scrutiny to apply).

103. See *Doe*, 665 F.3d at 545 (quoting *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 77 (1st Cir. 2004)).

104. See *id.* (“A statute or policy utilizes a ‘racial classification’ when, on its face, it explicitly distinguishes between people on the basis of some protected category.” (quoting *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999)) (internal quotation omitted)).

105. See *id.* at 554 (discussing intentional discrimination shown by racial classification). The Third Circuit relied on *Parents Involved* in its analysis, which stated “when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.” *Id.* at 545 (quoting *Parents Involved*, 551 U.S. at 720) (internal quotation omitted).

106. See *id.* at 545 (“The Plan, on its face, neither uses racial classification as a factor in student assignment nor distributes any burdens or benefits on the basis of racial classification. The lack of racial classification in Plan 3R distinguishes Plan 3R from the policies in every Supreme Court equal protection education case upon which Appellants rely in their brief . . .”).

107. See *id.* at 545–46 (distinguishing Plan 3R from prior precedent because in other cases policy at issue used race as sole factor).

108. See *id.* (noting importance of race in both cases).

109. *Id.* at 547 (quoting *Parents Involved*, 551 U.S. at 745–46) (internal quotation omitted).

110. See *id.* at 548 (“The consideration or awareness of race while developing or selecting a policy, however, is not in and of itself a racial classification. Thus, a decisionmaker’s awareness or consideration of race is not racial classification. Designing a policy ‘with racial factors in mind’ does not constitute a racial classification if the policy is facially neutral and is administered in a race-neutral fashion.”).

Plan 3R did not include racial classifications; therefore, strict scrutiny was not an appropriate standard of review on that basis.¹¹¹

2. *Intentional Discrimination Shown by Discriminatory Impact and Purpose*

The Supreme Court has also established that facially neutral policies demonstrating discriminatory impact and purpose are invalid and must withstand strict scrutiny analysis.¹¹² While disproportionate impact alone is not dispositive, demonstrating discriminatory impact is a necessary element to proving an Equal Protection violation.¹¹³ To establish discriminatory impact, the plaintiff must show that “similarly situated individuals of a different race were treated differently.”¹¹⁴ Notwithstanding discriminatory impact, the Supreme Court has held that “the Fourteenth Amendment guarantees equal laws, not equal results.”¹¹⁵ Thus, discriminatory purpose is also required for an Equal Protection violation.¹¹⁶

Once discriminatory impact is proven, the constitutional analysis turns to whether the policy was motivated by a discriminatory purpose.¹¹⁷ A policy is motivated by discriminatory purpose when the decision-maker adopts the challenged policy at least partially because the policy would benefit or burden an identifiable group.¹¹⁸ Conscious awareness that the

111. See *id.* (holding intentional discrimination was not demonstrated through racial classifications in Plan 3R).

112. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (holding facially neutral policies demonstrating discriminatory impact and motivated by discriminatory purpose are unconstitutional); see also *Bradley v. United States*, 299 F.3d 197, 205 (3d Cir. 2002) (requiring demonstration of discriminatory effect and purpose in Equal Protection claims).

113. See *Washington v. Davis*, 426 U.S. 229, 242 (1978) (“Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination . . .”).

114. See *Doe*, 665 F.3d at 550 (discussing discriminatory impact analysis).

115. *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

116. See *Doe*, 665 F.3d at 552 (discussing how courts should analyze whether discriminatory purpose was motivating factor). Factors include: “(1) whether the official action has a racially disproportionate impact; (2) the historical background of the decision; and (3) the legislative or administrative history of the decision.” *Id.*

117. See *Arlington Heights*, 429 U.S. at 266 (explaining that discriminatory impact provides an “important starting point” but purposeful discrimination is condition that offends Constitution). According to the Supreme Court in *Arlington Heights*, in order to determine whether “invidious discriminatory purpose was a motivating factor,” a court must conduct “a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” *Id.* Relevant evidence includes “the historical background of the decision,” “[t]he specific sequence of events leading up to the challenged decision,” “[d]epartures from the normal procedural sequence,” “[s]ubstantive departures,” and “[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” *Id.* at 267–68.

118. See *Feeney*, 442 U.S. at 279 (noting discriminatory purpose “implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of’ [the action’s] adverse effects upon an identifiable group”). Thus, the mere awareness or consideration of race should

policy will have a racially disparate impact, however, “does not invalidate an otherwise valid law, so long as that awareness played no causal role” in the adoption of the policy.¹¹⁹ When proof that discrimination on the basis of race was a motivating factor in the decision-making process, “judicial deference is no longer justified” and the court must apply strict scrutiny.¹²⁰ Absence of a discriminatory purpose on the part of the decision-maker, either explicit or inferable, only demands rational basis review.¹²¹

The Third Circuit concluded Plan 3R did not fall into this category of Equal Protection violations.¹²² In assessing whether Plan 3R produced any discriminatory impact, the Third Circuit noted that Students Doe provided no evidence to demonstrate Plan 3R treated similarly situated students differently depending on race.¹²³ Because Plan 3R was based on residency, all students living in South Ardmore, black and white, were redistricted to Harriton.¹²⁴ Consequently, the redistricting did not bear more heavily on African American students.¹²⁵

In addition to not having a discriminatory impact, Plan 3R was not motivated by a discriminatory purpose.¹²⁶ From the beginning, the Board of Directors made clear the objectives of redistricting by explicitly listing the Non-Negotiables and community values.¹²⁷ Not only were the Non-Negotiables neutral grounds for adopting Plan 3R, but the Board of Directors who voted in favor of the redistricting plan testified that race was not the basis for their decision.¹²⁸ Throughout the trial, Students Doe alleged the Board of Directors and developers of Plan 3R considered race

not be mistaken for racially discriminatory intent or for proof of an Equal Protection violation. *See id.*; *see also* *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 562 (3d Cir. 2002) (“A mere awareness of the consequences of an otherwise neutral policy will not suffice.”).

119. *United States v. Frazier*, 981 F.2d 92, 95 (3d Cir. 1992).

120. *Arlington Heights*, 429 U.S. at 265–66; *see also* *Pryor*, 288 F.3d at 562 (“Once a plaintiff establishes a discriminatory purpose based on race, the decisionmaker must come forward and try to show that the policy or rule at issue survives strict scrutiny . . .”).

121. *See Frazier*, 981 F.2d at 95 (commenting on Equal Protection jurisprudence with regard to racially discriminatory criminal justice sentencing schemes).

122. *See Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 555 (3d Cir. 2011) (holding Plan 3R was not discriminatory in impact or purpose).

123. *See id.* at 550 (disclosing Students Doe provided no evidence to suggest Plan 3R impacted black students disproportionately). All students living in Ardmore were similarly situated and treated the same in the redistricting process because they were all redistricted to Harriton. *See id.*

124. *See id.* at 552 (“Plan 3R redistricts to Harriton a significant number of students who are not African-American. Even while grandfathering was still in effect, forty-four students were redistricted to Harriton for the 2009–2010 school year and thirty of those students, nearly two-thirds, are not African-American.”).

125. *See id.* (concluding no disproportionate impact).

126. *See id.* at 551–55 (outlining discriminatory purpose analysis).

127. *See id.* at 552 (noting all neutral ground that Plan 3R was based on).

128. *See id.* (indicating no evidence establishing district court clearly erred when it found testimonies that race was not basis of voting for Board of Directors credible).

throughout the redistricting process and targeted Ardmore because of its high concentration of African American students.¹²⁹ In response, the Third Circuit emphasized that mere awareness of racial demographics does not constitute discriminatory purpose.¹³⁰ As such, the Third Circuit held Plan 3R did not exhibit discriminatory impact or purpose; therefore, strict scrutiny was not an appropriate standard of review.¹³¹

3. *Rational Basis Review*

The Third Circuit determined Lower Merion School District used “pristine, nondiscriminatory goals” as the focal points of redistricting.¹³² Because Plan 3R did not intentionally discriminate on the basis of race, the Third Circuit applied rational basis review.¹³³ Under rational basis review, the challenged policy must be “rationally related to a legitimate state interest.”¹³⁴ Applying such a deferential standard of review, Plan 3R—which lessened racial isolation within Lower Merion School District—passed constitutional muster.¹³⁵ Although Students Doe appealed the decision, the Supreme Court denied certiorari, which may signal approval of a rational basis approach to this area of law.¹³⁶

129. *See id.* at 553 (recounting Students Doe’s argument). Students Doe focused on the administrative history of Plan 3R and emphasized statements made by the Board of Directors and the information included in reports and presentations. *See id.*

130. *See id.* (arguing that Board of Directors was aware of race in effort to avoid discriminating on basis of race).

131. *See id.* at 555 (concluding that Plan 3R did not trigger strict scrutiny analysis).

132. *Id.* at 529.

133. *See id.* at 556–57 (summarizing rational basis analysis of Plan 3R).

134. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *see also Doe*, 665 F.3d at 556 (“In determining whether Plan 3R is reasonably related to legitimate state interests, our review is highly deferential.”).

135. *See Doe*, 665 F.3d at 557 (holding Plan 3R passed rational basis review). Lower Merion School District presented evidence that Plan 3R was aimed at accomplishing the following goals: “(a) equalizing the populations at the two high schools, (b) minimizing travel time and transportation costs, (c) fostering educational continuity, and (d) fostering walkability.” *Id.* Because Plan 3R reasonably related to these four stated goals, the redistricting did not violate the Equal Protection Clause. *See id.* (stating reasoning of holding).

136. *See Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 530 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 2773 (2012) (denying petition for writ of certiorari); Richard Ilgenfritz, *Supreme Court Denies Hearing Petition of Doe Students in Lower Merion Redistricting Case*, MAINLINE MEDIA NEWS (June 18, 2012), http://mainlinemedi-aneews.com/articles/2012/06/18/main_line_times/news/doc4fdf41eef30dc157940783.txt?viewmode=default (reporting that Supreme Court denied certiorari). Lower Merion School District officials released the following statement:

The nation’s highest court today let stand lower Federal judicial decisions in favor of the Lower Merion School District that affirmed the constitutionality of the District’s comprehensive 2009 redistricting plan. The District is pleased the litigation has come to an end with the U.S. Supreme Court declining to hear the final appeal filed by opponents of the Plan. The District has consistently maintained that the redistricting policy

IV. A PRACTITIONER'S GUIDE: DESEGREGATION EFFORTS
IN THE THIRD CIRCUIT

After the Supreme Court invalidated race-based student assignment plans in *Parents Involved*, the availability of meaningful desegregation policies seemed exceedingly limited.¹³⁷ Urging school districts to “bring to bear the creativity of experts, parents, administrators, and other concerned citizens to find a way to achieve the compelling interests” of avoiding segregation, Justice Kennedy left open the possibility of racial integration.¹³⁸ Heeding Justice Kennedy’s directive, Lower Merion School District developed Plan 3R, which complied with *Parents Involved* and achieved racial integration.¹³⁹ This Part of the Casebrief addresses the importance of racial integration and the flexibility school districts have in fostering desegregation efforts.¹⁴⁰ Additionally, this Part offers guidance on how practitioners can help school districts take proactive steps to achieve racial integration while remaining consistent with Supreme Court precedent.¹⁴¹

A. *The Benefits of a Racially Integrated Society*

Since the end of the civil rights movement, the Supreme Court has handed down decision after decision limiting the scope of desegregation policies.¹⁴² The results of these judgments: resegregation and growing achievement gaps.¹⁴³ In order to narrow such disparity between white and minority students, educational policies must address the continuing

adopted by the Board and implemented by the Administration was and remains educationally and operationally appropriate, and constitutional.

Id.

137. See Robinson, *supra* note 16, at 280 (“*Parents Involved* and the Supreme Court’s requirements for strict scrutiny make any consideration of race in student assignments so difficult and impractical that very few districts, if any, are likely to choose to continue to consider the race of individual students when they assign students to schools.”).

138. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring).

139. See Robinson, *supra* note 16, at 279 (“[R]ecent evidence indicates that, although some districts abandoned efforts to promote diversity after the *Parents Involved* decision, many school districts continue to pursue diversity but have adjusted their approach to doing so.”).

140. For a discussion of the importance of a racially integrated society, see *infra* notes 142–48 and accompanying text.

141. For a practical look at how practitioners can help school districts achieve racial integration, see *infra* notes 149–64 and accompanying text.

142. For a discussion on prior Supreme Court cases ruling on racial desegregation, see *supra* notes 37–67 and accompanying text.

143. See Robinson, *supra* note 16, at 326 (“[A]voiding racial isolation and promoting diversity remains an important component of equal educational opportunity because . . . racially isolated educational settings offer inferior educational opportunities to their students and produce inferior outcomes, while diverse educational settings reap important benefits.”).

resegregation trends in our public school system.¹⁴⁴ While education reform is often guided by an objective of attaining higher academic achievement, desegregation serves an added purpose.¹⁴⁵ In addition to the standard reading and math curriculum, schools act as an “entry into the mainstream of society.”¹⁴⁶ Racially integrated schools foster higher academic achievement and better equipped students to manage our diverse society.¹⁴⁷ Racial isolation is prevalent across our entire nation and school districts must respond to counter it.¹⁴⁸

144. See NAT’L ACAD. OF EDUC., COMM. ON SOC. SCI. RESEARCH EVIDENCE ON RACIAL DIVERSITY IN SCH., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 3 (Robert L. Linn & Kevin G. Welner eds., 2007), http://www.naeducation.org/xpedio/groups/naedsite/documents/webpage/NAED_080863.pdf (“[R]esearch evidence supports the conclusion that the overall academic and social effects of increased racial diversity are likely to be positive”); see also Orfield et al., *supra* note 10, at xix (“Federal and state education policy has been based on the assumptions that the continuing resegregation of students is not a fundamental educational problem, and racial and ethnic equality can be achieved primarily through tougher and tougher systems of accountability and sanctions, while doing nothing about the intensifying isolation of students by race and poverty Almost all states that had strategies fostering integration have abandoned them, instead adopting accountability policies that failed to meet their promises to close achievement gaps, policies that have branded thousands of segregated schools as failures.”).

145. See NAT’L ACAD. OF EDUC., *supra* note 144, at 21 (“Although the plaintiff’s primary concern in the [*Brown*] case was to gain access to equal educational opportunities for African American children, many social scientists also believed that school desegregation held the potential to improve intergroup relations.”); see also Orfield et al., *supra* note 10, at 12 (“School desegregation is often discussed as if it were a kind of educational reform for poor nonwhite children, but it also has much broader purposes for all groups of students, including whites and Asians. Most critics look at nothing but test scores, usually in only two subjects. The broader purposes of schools are very hard, often impossible, to achieve in segregated settings.”).

146. Orfield et al., *supra* note 10, at 12. “Integrated education is the training ground for integrated communities in a successful multiracial society.” *Id.*

147. See NAT’L ACAD. OF EDUC., *supra* note 144, at 43–44 (discussing primary conclusions of research regarding effects of racial diversity on academic achievement). While the effects of racial integration do not harm white students, studies suggest the academic achievement of black students is improved by such efforts. See *id.* (noting effects of desegregation on white and black students respectively); see also Orfield et al., *supra* note 10, at 12 (“Segregated education has a self-perpetuating character, but so does integration. Children who grow up in integrated schools lead more integrated lives and are better equipped to deal with diversity in their adult lives.”).

148. See Orfield et al., *supra* note 10, at 32 (“The Northeast—where the presence of small, deeply fragmented school districts and severe housing segregation foster patterns of school racial and socioeconomic isolation—is the only region where the segregation of black students in 90–100% minority schools increased every decade between 1968 and 2001.”).

B. *The Third Circuit Opens the Door to Race-Conscious Redistricting Policies*

With this backdrop, it is clear that meaningful change can only come with a restructuring of our current public school system.¹⁴⁹ While the Supreme Court and federal administration fail to make desegregation within our public schools a priority, the recent Third Circuit decision offers a framework for advocates of racial integration.¹⁵⁰ Specifically, *Doe* permits school districts and practitioners to form race-conscious redistricting policies, which ultimately allows for a more integrated public school system.¹⁵¹ By following the Equal Protection analysis outlined in *Parents Involved* and *Doe*, practitioners can assist school districts in mitigating the risk of a constitutional challenge.¹⁵²

Most desegregation policies designed to achieve racial diversity or avoid racial isolation either rely on the race of individual students or do not.¹⁵³ In an effort to desegregate schools, school districts and practitioners should adopt racial integration policies that do not rely on the race of individual students.¹⁵⁴ Specifically, these policies should be approached from a race-neutral position.¹⁵⁵ While a race-neutral policy can be advanced in a race-conscious fashion, it cannot rely on race as an explicit criterion.¹⁵⁶ Justice Kennedy endorsed such policies, which are designed to achieve integration without specifically classifying individual students

149. See *id.* at xxii (“Conditions will only change if we decide to change them.”).

150. See Robinson, *supra* note 16, at 361–62 (arguing direction of our nation regarding desegregation depends on how courts assess race-conscious integration policies post-*Parents Involved*).

151. See Orfield et al., *supra* note 10, at xxii (“A changed Supreme Court or a national administration making integration a serious priority could make a major difference.”); see also Ryan, *supra* note 23, at 137–38 (“[S]chool officials interested in racial integration, as well as their attorneys, are rightly poring over the opinion for guidance going forward.”).

152. See U.S. DEP’T OF EDUC., TECHNICAL ASSISTANCE FOR STUDENT ASSIGNMENT PLANS (2009), available at <http://www2.ed.gov/programs/tasap/index.html> (“The [Technical Assistance for Student Assignment Plans] program provides one-time competitive grants to local educational agencies to procure technical assistance in preparing, adopting, or modifying, and implementing student assignment plans to avoid racial isolation and resegregation in the Nation’s schools, and to facilitate student diversity, within the parameters of current law.”). Post-*Parents Involved*, the federal government funded grants specifically designed to help school districts seek assistance in implementing policies that integrate schools. See *id.*

153. See Robinson, *supra* note 16, at 280 (detailing two approaches school districts may adopt to reduce racial isolation and create diverse schools).

154. See *id.* (describing how school districts can reduce racial isolation and create diverse schools in aftermath of *Parents Involved*); see also U.S. DEP’T OF EDUC., VOLUNTARY USE OF RACE, *supra* note 13 (setting out considerations when school districts implement desegregation policies).

155. See Robinson, *supra* note 16, at 280 (analyzing holding of *Parents Involved* and determining approaches necessary to avoid constitutional challenge).

156. See *id.* (noting policies indirectly rely on race).

based on race.¹⁵⁷ These race-conscious approaches are unlikely to demand strict scrutiny and therefore are likely to pass constitutional muster.¹⁵⁸

When school districts are faced with Equal Protection challenges, the first step of the court will be to determine the appropriate level of scrutiny.¹⁵⁹ While race-conscious integration policies only demand rational basis review, the policies still must be rationally related to a legitimate state interest.¹⁶⁰ Though there are several approaches that school districts can take to avoid constitutional challenge, *Doe* provides a practical example.¹⁶¹ By explicitly listing race-neutral grounds for redistricting—the Non-Negotiables and community values—Lower Merion School District was able to implement a race-conscious policy that was rationally related to the legitimate purposes outlined by the Board of Directors.¹⁶² In the case of student redistricting policies, therefore, practitioners must advise school districts to document the legitimate, race-neutral interests for redistricting.¹⁶³ As such, the developers of the redistricting plan may also consider racial impact, which will foster integration.¹⁶⁴

157. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 788–89 (2007) (“If school authorities are concerned that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students, they are free to devise race-conscious measures to address the problem in a general way and without treating each student in different fashion solely on the basis of a systematic, individual typing by race.”).

158. For a discussion of Justice Kennedy’s concurrence, see *supra* notes 58–64 and accompanying text.

159. For a discussion of Equal Protection jurisprudence, see *supra* notes 92–97 and accompanying text.

160. See *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 556 (3d Cir. 2011) (stating rational basis review is highly deferential); see also *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (establishing rational basis standard of review).

161. See Robinson, *supra* note 16, at 280 (providing guidance on numerous avenues school districts can take to integrate on race-neutral grounds). “Examples of such efforts include (1) student assignment plans that integrate based on socioeconomic status, (2) drawing school attendance zones to bring diverse groups together, and (3) offering magnet programs.” *Id.*

162. See *Doe*, 665 F.3d at 556 (“Plan 3R is rationally related to a legitimate interest ‘if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” (quoting *Donatelli v. Mitchell*, 2 F.3d 508, 513 (3d Cir. 1993))).

163. See U.S. DEP’T OF EDUC., VOLUNTARY USE OF RACE, *supra* note 13 (outlining key steps for implementing programs to achieve diversity or avoid racial isolation).

164. See *id.* (detailing how school districts can redraw attendance zones to achieve racial integration).

V. CONCLUSION

According to Chief Justice Roberts, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁶⁵ The solution to racial segregation, however, is not so black and white.¹⁶⁶ The Third Circuit’s decision in *Doe* marks a progressive step toward a racially integrated society.¹⁶⁷ By providing some flexibility to current Equal Protection desegregation jurisprudence, school districts and practitioners are given the opportunity to implement race-conscious policies, which operate to meaningfully integrate our public school system and realize the commitment of *Brown*.¹⁶⁸

165. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

166. See Orfield et al., *supra* note 10, at xv (“The problem is not just about skin color; the fact is that segregation is multidimensional. The history of our society links opportunity to race in ways that produce self-perpetuating inequalities—even without any intentional discrimination by educational and political leaders.”); see also BARTON & COLEY, *supra* note 42, at 38 (“We have, advertently and inadvertently, spun a wide and sticky web of conditions that are holding back progress It will be necessary to move forward with all deliberate thought, care, and speed.”).

167. See Robinson, *supra* note 16, at 362 (noting decisions like *Doe* would help nation continue “unfinished civil rights agenda”).

168. See *id.* at 351 (“Given the ability of race-neutral efforts to advance the provision of equal educational opportunity and to avoid many of the harms of racial classifications, school districts should enjoy wide latitude to adopt race-neutral student assignment plans.”).